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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT.

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December 16, 1985

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No. _____, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Comes now the State of Kansas, by its Attorney General, the Honorable Robert T. Stephan, and hereby moves the Court for leave to file its complaint against the State of Colorado.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

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No. _____, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

COMPLAINT

The State of Kansas, by its Attorney General, the Honorable Robert T. Stephan, brings this suit against the Defendant, State of Colorado, and for its cause of action states:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28 of the United States Code.

2. The Arkansas River is an interstate river which rises near Leadville, Colorado and flows south to Salida, Colorado, east through Canon City and Pueblo, and across southeastern Colorado into the State of Kansas.

3. In order to resolve existing and future controversies and to divide and equitably apportion the water of the Arkansas River, Congress consented to the negotiation of a compact by the states of Colorado and Kansas. Act of April 19, 1945, 59 Stat. 53. Subsequently, the Arkansas River Compact was ratified by the State of Colorado by the Act of February 19, 1949, Colo. Rev. Stat. 1963, § 149-9-1; the State of Kansas ratified the Compact by the Act of March 7, 1949, Kansas Gen. Stat. Ann. 1964, § 82a-520. The Compact was approved and enacted into federal law by the Act of Congress of May 31, 1949, 63 Stat. 145. A copy of the Arkansas River Compact is attached hereto as Appendix A and made a part hereof by reference.

4. The principal purpose of the Arkansas River Compact was to "(e)quitably divide and apportion . . . the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes." 63 Stat. 145, 145, art. I.

5. While expressly recognizing the possibility of offsetting postcompact development of the waters of the Arkansas River by new regulation or increased efficiency, the Compact mandates "that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas . . . by such future development or construction." 63 Stat. 145, 147, art. IV(D).

6. The Compact provides that "Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities . . .." 63 Stat. 145, 148, art. V(F).

7. Through the actions of its officers, agents and political subdivisions, the State of Colorado and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact.

8. In spite of its duties and obligations under the Compact, since 1949 the State of Colorado has allowed and permitted substantial increases in the diversion and use in Colorado of the surface and hydrologically related ground waters of the Arkansas River, without the concomitant regulatory or conservation measures that the Compact requires to protect the states against material depletions in usable stateline flows.

9. The lack of effective administrative practices in Colorado has encouraged rather than retarded the development of postcompact depletions of the waters of the Arkansas River Basin and has resulted in ongoing, material depletions of the usable flows of the Arkansas River and substantial and irreparable injury to Kansas water users.

10. For more than twenty years, the State of Colorado has investigated and known the impact of the ground water appropriations in the Arkansas River Basin in Colorado. Approximately 150,000 acre feet per year of ground water related to the Arkansas River has been appropriated in Colorado since 1949, and the State of Colorado has intentionally disregarded the findings of its investigations to the effect that such appropriations directly and materially reduce the usable flow and availability of the Arkansas River in Colorado

and Kansas. By its acquiescence in the postcompact proliferation of ground water diversions and its failure to administer the priorities of postcompact ground water diversions with existing surface diversions, Colorado has breached and continues to breach its obligations and responsibilities under the Arkansas River Compact.

11. Since the adoption of the Compact, the State of Colorado has attempted to unilaterally impede the bilateral action of the Compact Administration intended to protect Kansas' Compact apportionment and has failed to apply and administer its internal laws in order to meet its obligations under the Compact.

12. Pursuant to Article VIII(H), the Arkansas River Compact Administration has conducted an investigation of alleged Compact violations. The State of Colorado, however, through its Compact Commissioner, has rejected and continues to reject the State of Kansas' requests to investigate the impact on the Arkansas River of: 1) Colorado's substantial, postcompact ground water depletions of surface flows at the stateline; 2) the failure of Colorado to administer ground water priorities against surface priorities; 3) Colorado's artificially transferring water from the storage pool in Trinidad Reservoir to the sediment pool and then refilling the storage pool to the detriment of downstream users; 4) the consequences of future increases in the consumption of Colorado's transmountain return flows; and 5) Colorado's unilateral rejection of the Arkansas River Compact Administration's Resolution of July 24, 1951, requiring that any reregulaion of the native waters of the Arkansas River be approved by the Compact Administration. Additionally, the State of Colorado refuses to enjoin its postcompact ground water appropriations and resulting surface depletions during the pendency of investigation of the effects of such appropriations, in spite of the irrefutable fact that those appropriations materially deplete the usable and available flows of the Arkansas River. Accordingly, the State of Colorado has used and will continue to use the pending administrative investigation as the basis for prolonging the substantial and irreparable injury to the State of Kansas by wrongfully depriving the State of Kansas and its citizens of the waters of the Arkansas River to which they are entitled under the Compact.

13. Grave and irreparable injury to the State of Kansas and its citizens who were entitled to receive and use the water apportioned to them by the Arkansas River Compact has been caused by the acts and conduct of the State of Colorado, its officers, citizens, and political subdivisions in failing neglecting, and refusing to deliver water to Kansas in the usable and available quantities apportioned to it by the Compact.

14. Grave and irreparable injury will be suffered in the future by the State of Kansas and its citizens unless relief is afforded by this Court to prevent the State of Colorado, its officers, citizens, and political subdivisions from using and withholding water which Kansas is entitled to and which Colorado has heretofore agreed to deliver pursuant to the terms and provisions of the Arkansas River Compact.

15. The State of Kansas has no effective remedy to enforce its rights under the Arkansas River Compact against the State of Colorado other than through the exercise of original jurisdiction in this case.

WHEREFORE, the State of Kansas respectfully prays that the Court issue its decree commanding the State of Colorado, its officers, citizens, and political subdivisions to deliver the waters of the Arkansas River in accordance with the provisions

of the Arkansas River Compact and providing for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Assistant Attorney General

RICHARD A. SIMMS
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APPENDIX A

ARKANSAS RIVER COMPACT, 1948

The State of Colorado and the State of Kansas, parties signatory to this Compact (hereinafter referred to as "Colorado" and "Kansas", respectively, or individually as a "State", or collectively as the "States") having resolved to conclude a compact with respect to the waters of the Arkansas River, and being moved by considerations of interstate comity, having appointed commissioners as follows: "Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, for Colorado; and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, for Kansas"; and the consent of the Congress of the United States to negotiate and enter into an interstate compact not later than January 1, 1950, having been granted by Public Law 34, 79th Congress, 1st Session, and pursuant thereto the President having designated Hans Kramer as the representative of the United States, the said commissioners for Colorado and Kansas, after negotiations participated in by the representatives of the United States, have agreed as follows:

ARTICLE I

The major purposes of this Compact are to:

A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

ARTICLE II

The provisions of this Compact are based on (1) the physical and other conditions peculiar to the Arkansas River and its natural drainage basin, and the nature and location of irrigation and other developments and facilities in connection therewith; (2) the opinion of the United States Supreme Court entered December 6, 1943, in the case of *Colorado v. Kansas* (320 U.S. 383) concerning the relative rights of the respective States in and to the use of waters of the Arkansas River; and (3) the experience derived under various interim executive agreements between the two States apportioning the waters released from the John Martin Reservoir as operated by the Corps of Engineers.

ARTICLE III

As used in this Compact:

A. The word "Stateline" means the geographical boundary line between Colorado and Kansas.

B. The term "waters of the Arkansas River" means the waters originating in the natural drainage basin of the Arkansas River, including its tributaries, upstream from the Stateline, and excluding waters brought into the Arkansas River Basin from other river basins.

C. The term "Stateline flow" means the flow of waters of the Arkansas River as determined by gaging stations located at or near the Stateline. The flow as determined by such stations, whether located in Colorado or Kansas, shall be deemed to be the actual Stateline flow.

D. "John Martin Reservoir Project" is the official name of the facility formerly known as Caddoa Reservoir Project, authorized by the Flood Control Act of 1936, as amended, for construction, operation and maintenance by the War Department, Corps of Engineers, later designated as the Corps of

Engineers, Department of the Army, and herein referred to as the "Corps of Engineers". "John Martin Reservoir" is the water storage space created by "John Martin Dam".

E. The "flood control storage" is that portion of the total storage space in John Martin Reservoir allocated to flood control purposes.

F. The "conservation pool" is that portion of the total storage space in John Martin Reservoir lying below the flood control storage.

G. The "ditches of Colorado Water District 67" are those ditches and canals which divert water from the Arkansas River or its tributaries downstream from John Martin Dam for irrigation use in Colorado.

H. The term "river flow" means the sum of the flows of the Arkansas and the Purgatoire Rivers into John Martin Reservoir as determined by gaging stations appropriately located above said Reservoir.

I. The term "the Administration" means the Arkansas River Compact Administration established under Article VIII.

ARTICLE IV

Both States recognize that:

A. This Compact deals only with the waters of the Arkansas River as defined in Article III.

B. This Compact is not concerned with the rights, if any, of the State of New Mexico or its citizens in and to the use in New Mexico of waters of Trinchera Creek or other tributaries of the Purgatoire River, a tributary of the Arkansas River.

C. (1) John Martin Dam will be operated by the Corps of Engineers to store and release the waters of the Arkansas River in and from John Martin Reservoir for its authorized purposes.

(2) The bottom of the flood control storage is presently fixed by the Chief of Engineers, U.S. Army, at elevation 3,851 feet above mean sea level. The flood control storage will be operated for flood control purposes and to those ends will impound or regulate the streamflow volumes that are in excess of the then available storage capacity of the conservation pool. Releases from the flood control storage may be made at times and rates determined by the Corps of Engineers to be necessary or advisable without regard to ditch diversion capacities or requirements in either or both States.

(3) The conservation pool will be operated for the benefit of water users in Colorado and Kansas, both upstream and downstream from John Martin Dam, as provided in this Compact. The maintenance of John Martin Dam and appurtenant works may at times require the Corps of Engineers to release waters then impounded in the conservation pool or to prohibit the storage of water therein until such maintenance work is completed. Flood control operation may also involve temporary utilization of conservation storage.

D. This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

ARTICLE V

Colorado and Kansas hereby agree upon the following basis of apportionment of the waters of the Arkansas River:

A. Winter storage in John Martin Reservoir shall commence on November 1st of each year and continue to and include the next succeeding March 31st. During said period all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow, but such releases shall not exceed 100 c.f.s. (cubic feet per second) and water so released shall be used without avoidable waste.

B. Summer storage in John Martin Reservoir shall commence on April 1st of each year and continue to and include the next succeeding October 31st. During said period, except when Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow up to 500 c.f.s., and Kansas may demand releases of water equivalent to that portion of the river flow between 500 c.f.s. and 750 c.f.s., irrespective of releases demanded by Colorado.

C. Releases of water stored pursuant to the provisions of paragraphs A and B of this Article shall be made upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period. Unless increases to meet extraordinary conditions are authorized by the Administration, separate releases of stored water to Colorado shall not exceed 750 c.f.s., separate releases of stored water to Kansas shall not exceed 500 c.f.s., and concurrent releases of stored water shall not exceed a total of 1,250 c.f.s.: Provided, that when water stored in the conservation pool is reduced to a quantity less than 20,000 acre-feet, separate releases of stored water to Colorado shall not exceed 600 c.f.s., separate releases of stored water to Kansas shall not exceed 400 c.f.s., and concurrent releases of stored water shall not exceed 1,000 c.f.s.

D. Releases authorized by paragraphs A, B and C of this Article, except when all Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, shall not impose any call on Colorado water users that divert waters of the Arkansas River upstream from John Martin Dam.

E. (1) Releases of stored water and releases of river flow may be made simultaneously upon the demands of either or both States.

(2) Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the Administration.

(3) Releases of river flow and of stored water to Colorado shall be measured by gaging stations located at or near John Martin Dam and the releases to which Kansas is entitled shall be satisfied by an equivalent in Stateline flow.

(4) When water is released from John Martin Reservoir appropriate allowances as determined by the Administration shall be made for the intervals of time required for such water to arrive at the points of diversion in Colorado and at the Stateline.

(5) There shall be no allowance or accumulation of credits or debits for or against either State.

(6) Storage, releases from storage and releases of river flow authorized in this Article shall be accomplished pursuant to procedures prescribed by the Administration under the provisions of Article VIII.

F. In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen (14) day period, unless a

change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. Such priority administration by Colorado shall be continued until the Administration finds that water is again available in the conservation pool for release as provided in this Compact, and timely notice of such finding shall be given by the Administration to the State Engineer of Colorado or his duly authorized representative: Provided, that except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this Compact, when there is water in the conservation pool the water users upstream from John Martin Reservoir shall not be affected by the decrees to the ditches in Colorado Water District 67. Except when administration in Colorado is on a priority basis the water diversions in Colorado Water District 67 shall be administered by Colorado in accordance with distribution agreements made from time to time between the water users in such District and filed with the Administration and with the State Engineer of Colorado or, in the absence of such agreement, upon the basis of the respective priority decrees, as against each other, in said District.

G. During periods when Colorado reverts to administration of decreed priorities, Kansas shall not be entitled to any portion of the river flow entering John Martin Reservoir. Waters of the Arkansas River originating in Colorado which may flow across the Stateline during such periods are hereby apportioned to Kansas.

H. If the usable quantity and availability for use of the waters of the Arkansas River to water users in Colorado Water

District 67 and Kansas will be thereby materially depleted or adversely affected, (1) priority rights now decreed to the ditches of Colorado Water District 67 shall not hereafter be transferred to other water districts in Colorado or to points of diversion or places of use upstream from John Martin Dam; and (2) the ditch diversion rights from the Arkansas River in Colorado Water District 67, and of Kansas ditches between the Stateline and Garden City shall not hereafter be increased beyond the total present rights of said ditches, without the Administration, in either case (1) or (2), making findings of fact that no such depletion or adverse effect will result from such proposed transfer or increase. Notice of legal proceedings for any such proposed transfer or increase shall be given to the Administration in the manner and within the time provided by the laws of Colorado or Kansas in such cases.

ARTICLE VI

A. (1) Nothing in this Compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas River that originate in Kansas and over the waters that flow from Colorado across the Stateline into Kansas.

(2) Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

B. Inasmuch as the Frontier Canal diverts waters of the Arkansas River in Colorado west of the Stateline for irrigation uses in Kansas only, Colorado concedes to Kansas and Kansas hereby assumes exclusive administrative control over the operation of the Frontier Canal and its headworks for such

purposes, to the same extent as though said works were located entirely within the State of Kansas. Water carried across the Stateline in the Frontier Canal or another similarly situated canal shall be considered to be part of the Stateline flow.

ARTICLE VII

A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

B. This Compact establishes no general principle or precedent with respect to any other interstate stream.

C. Wherever any State or Federal official or agency is referred to in this Compact such reference shall apply to the comparable official or agency succeeding to their duties and functions.

ARTICLE VIII

A. To administer the provisions of this Compact there is hereby created an interstate agency to be known as the Arkansas River Compact Administration herein designated as "The Adminstration."

B. The Administration shall have power to:

(1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of this Compact;

(2) Prescribe procedures for the administration of this Compact: Provided, that where such procedures involve the operations of John Martin Reservoir Project they shall be subject to the approval of the District Engineer in charge of said Project;

(3) Perform all functions required to implement this Compact and to do all things necessary, proper or convenient in the performance of its duties.

C. The membership of the Administration shall consist of three representatives from each State who shall be appointed by the respective Governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in Water Districts 14 or 17, one Colorado representative shall be a resident of and water right owner in Water District 67, and one Colorado representative shall be the Director of the Colorado Water Conservation Board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief State official charged with the adminsitration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex-officio member and act as chairman of the Administration without vote.

D. The State representatives shall be appointed by the respective Governors within thirty days after the effective date of this Compact. The Administration shall meet and organize within sixty days after such effective date. A quorum for any meeting shall consist of four members of the Administration: Provided, that at least two members are present from each State. Each State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote. In case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event the decision made by such arbitrator or arbitrators shall be binding upon the Administration.

E. (1) The salaries, if any, and the personal expenses of each member shall be paid by the government which he represents. All other expenses incident to the administration of this Compact which are not paid by the United States shall be borne by the States on the basis of 60 per cent by Colorado and 40 per cent by Kansas.

(2) In each even numbered year the Administration shall adopt and transmit to the Governor of each State its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by each State. Each State shall appropriate and pay the amount due by it to the Administration.

(3) The Administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public accountant, in its annual report. Each State shall have the right to make an examination and audit of the accounts of the Administration at any time.

F. Each State shall provide such available facilites, equipment and other assistance as the Administration may need to carry out its duties. To supplement such available assistance the Administration may employ engineering, legal, clerical, and other aid as in its judgment may be necessary for the performance of its functions. Such employees shall be paid by and be responsible to the Administration, and shall not be considered to be employees of either State.

G. (1) The Administration shall cooperate with the chief official of each State charged with the administration of water rights and with Federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas River and as to the operation and siltation of John Martin Reservoir and other related structures. The Administration shall cooperate in the procurement, interchange, compilation and publication of all factual data bearing

upon the administration of this Compact without, in general, duplicating measurements, observations or publications made by State or Federal agencies. State officials shall furnish pertinent factual data to the Administration upon its request. The Administration shall, with the collaboration of the appropriate Federal and State agencies, determine as may be necessary from time to time, the location of gaging stations required for the proper administration of this Compact and shall designate the official records of such stations for its official use.

(2) The Director, U.S. Geological Survey, the Commissioner of Reclamation and the Chief of Engineers, U.S. Army, are hereby requested to collaborate with the Administration and with appropriate State officials in the systematic determination and correlation of data referred to in paragraph G (1) of this Article and in the execution of other duties of such officials which may be necessary for the proper administration of this Compact.

(3) If deemed necessary for the administration of this Compact, the Administration may require the installation and maintenance, at the expense of water users, of measuring devices of approved type in any ditch or groups of ditches diverting water from the Arkansas River in Colorado or Kansas. The chief official of each State charged with the administration of water rights shall supervise the execution of the Administration's requirements for such installations.

H. Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, it being the intent of this Compact that enforcement of its terms shall

be accomplished in general through the State agencies and officials charged with the administration of water rights.

I. Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found.

J. The Administration shall report annually to the Governors of the States and to the President of the United States as to matters within its purview.

ARTICLE IX

A. This Compact shall become effective when ratified by the Legislature of each State and when consented to by the Congress of the United States by legislation providing substantially, among other things, as follows:

"Nothing contained in this Act or in the Compact herein consented to shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such Compact: Provided, that the Chief of Engineers is hereby authorized to operate the conservation features of the John Martin Reservoir Project in a manner conforming to such Compact with such exceptions as he and the Administration created pursuant to the Compact may jointly approve."

B. This Compact shall remain in effect until modified or terminated by unanimous action of the States and in the event of modification or termination all rights then established or recognized by this Compact shall continue unimpaired.

IN WITNESS WHEREOF, The commissioners have signed this Compact in triplicate original, one of which shall be forwarded to the Secretary of State of the United States of America and one of which shall be forwarded to the Governor of each signatory State.

Done in the City and County of Denver, in the state of Colorado, on the fourteenth day of December, in the Year of our Lord One Thousand Nine Hundred and Forty-eight.

Henry C. Vidal
Gail L. Ireland
Harry B. Mendenhall
Commissioners for Colorado

George S. Knapp
Edward F. Arn
William E. Leavitt
Roland H. Tate
Commissioners for Kansas

Attest:
Warden L. Noe
Secretary

Approved:
Hans Kramer
Representative of the United States

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Luckey, Richard R. and Livingston, Russell K., "Reservoir Release Routing Model for the Upper Arkansas River Basin of Colorado," Colorado Water Resources Circular 27, 1975 3

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Moses & Vranesh, "Colorado's Ground Water Laws," 38 U.Colo.L.Rev. 294 (1966) 3

Papadopulos, S. S. & Associates, Inc., "Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact," December 6, 1985 9

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

This is an action to enforce the apportionment made to the State of Kansas by the Arkansas River Compact. Act of May 31, 1949, 63 Stat. 145. Since the Compact was enacted in 1949, continued development in Colorado, primarily by unregulated alluvial wells, has depleted the flows of the Arkansas River and has substantially impaired Kansas' entitlement under the Compact. Lacking any other effective remedy, Kansas

seeks to avail itself of the original jurisdiction of the Court to enjoin the continuing compact violations that are causing substantial and irreparable injury to downstream water users in Kansas.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under the Judiciary Act, 28 U.S.C. § 1251 (a).

STATEMENT OF FACTS

The states of Colorado and Kansas agreed to an equitable apportionment of the waters of the Arkansas River in the Arkansas River Compact of December 14, 1948. *See,* Act of March 7, 1949, Kansas Gen. Stat. Ann. 1964 § 83a-520; Act of February 19, 1959, Colo Rev. Stat. 1963, § 149-9-1. The Compact resolved the longstanding conflict over each state's entitlement to the Arkansas River. *See, Kansas v. Colorado,* 206 U.S. 46 (1907); *Colorado v. Kansas,* 320 U.S. 383 (1943). Predicated on the construction of a major water conservation and storage project, John Martin Reservoir, the Compact's apportionment of the Arkansas River was intended to remove the ambiguity and uncertainty that had resulted in litigation and to allow for future development in the Arkansas River Basin, so long as the proposed development would not materially deplete in usable quantity or availability the flows of the river at the stateline. Article IV(D), 63 Stat. 145, 147. The Arkansas River Compact was approved and enacted into federal law by the Act of Congress of May 31, 1949, 63 Stat. 145.

As was anticipated by the states when the Compact was negotiated, the usable stateline flows increased as a result of the construction and operation of John Martin Reservoir. *See,* Article V, 63 Stat. 145, 147-149. Since 1974, however, there has been a substantial decrease in usable stateline flows.

According to numerous hydrologic studies, including studies conducted for the Colorado State Engineer and the Colorado Water Conservation Board, the primary cause of the post-compact depletions of stateline flows has been the development of some 1,500 unregulated alluvial wells in Colorado. *See, e.g.,* Colorado Office of the State Engineer, "Stream Depletion by Wells in the Arkansas River Basin," 1975; W. W. Wheeler and Associates and Woodward-Clyde Consultants, "Water Legislation Investigations for the Arkansas River Basin in Colorado," Vols. I & II, 1968; Luckey, Richard R. and Livingston, Russell K., "Reservoir Release Routing Model for the Upper Arkansas River Basin of Colorado," Colorado Water Resources Circular 27, 1975. The problem derived from the Colorado State Engineer's refusal to coordinate the administration of surface and tributary ground water. *See,* Moses & Vranesh, "Colorado's Ground Water Laws," 38 U.Colo.L.Rev. 294 (1966). Until 1965, after nearly all of the well development had taken place in Colorado, there was absolutely no administration of ground water withdrawals in the Arkansas River Basin of Colorado. *See, e.g.,* Hillhouse, "Integrating Ground & Surface Water Use in an Appropriation State," 20 Rocky Mountain Min. L. Inst. 691 (1975).

After Colorado's ground water depletions became manifest on surface flows at the stateline, Colorado's deficient administrative practices above John Martin Reservoir were raised by Kansas at meetings of the Arkansas River Compact Administration, the interstate body created to administer the provisions of the Compact. *See,* Article VIII, 63 Stat. 145, 149-151. Numerous special and regular meetings of the Administration were devoted to discussion of the problems, but essentially no progress was made toward their resolution. In 1982, the Attorneys General of both states met with the Administration to clarify the issues. After nearly two years of discussions and a protracted exchange of correspondence, the matter was brought to a head by an unsuccessful attempt

by Kansas to initiate arbitration pursuant to Article VIII(D) of the Compact. 63 Stat. 145, 149.

In September, 1983, the State of Kansas retained an independent consulting firm to begin an engineering and geohydrologic analysis of postcompact depletions in usable stateline flows. Following the preliminary assessment of its consulting engineers, Kansas also initiated a bilateral administrative investigation of the depletions pursuant to Article VIII(H) of the Compact. The Compact Administration resolved on March 28, 1985, pursuant to Article VIII(H), to investigate Kansas' allegations of compact violation, as well as counter-allegations made by Colorado. To carry out the Resolution a committee was created, consisting of the Director of the Colorado Water Conservation Board and the Chief Engineer of Kansas. The committee was charged with the conduct of the investigation and to report to the Administration "on a monthly basis in regard to each issue for which the investigation is incompleted."

As amended on July 12, 1985, the Resolution of March 28, 1985 calls for the prompt investigation of:

> 1. Whether the waters of the Arkansas River have been or are being materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under the Compact by:
>
> a. the operation of the Trinidad Dam and Reservoir Project, Colorado,
>
> b. the operation of Pueblo Dam and Reservoir, Colorado, and the winter water storage program on the Arkansas River in Colorado,
>
> c. well development of the waters of the Arkansas River in Colorado, and
>
> d. well development of the waters of the Arkansas River in Kansas;

> 2. Whether water released from John Martin Dam and Reservoir has been stored in Lake McKinney, Kansas, rather than being applied promptly to beneficial use, without the prior authorization of the Administration;
>
> 3. Whether the State of Colorado has complied with the provisions of Article V F of the Arkansas River Compact in the administration of the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now and hereafter decreed to water users diverting upstream from John Martin Dam, including groundwater rights, on the basis of relative priorities; and
>
> 4. Whether there have been increases in ditch diversion rights from the Arkansas River by Kansas ditches between the Stateline and Garden City beyond the rights existing at the time of the execution of the Compact, which increases have occurred without the Administration first making findings of fact that the usable quantity and availability for use of the waters of the Arkansas River to water users in Colorado Water District 67 and Kansas would not be thereby materially depleted or adversely affected.

Subsequently, the committee met on a monthly basis to pursue the investigation. In addition to existing studies of well depletions, the committee agreed to construct a series of eight mass diagrams, plotted in six different ways. It was agreed that mass diagrams could be used to identify postcompact changes in the regimen of the river, but that the diagrams would not be useful in isolating the cause or causes of any indicated change.

On July 12, 1985, the investigation committee held a third meeting in Lamar, Colorado. After preliminary discussions

failed to produce a consensus regarding the conclusions that could be drawn from the diagrams, it was agreed that each state would prepare a report interpretating the data and mass diagrams. Colorado's report, dated September 6, 1985, and Kansas' report dated September 4, 1985, contain the divergent findings and conclusions of the states. At its fourth meeting on September 17, 1985, the committee discussed the conclusions in the respective reports, but was unable to agree on the conclusions to be drawn from the studies and on what further investigation, if any, should be undertaken.

The committee met again on October 8, 1985. Prior to the meeting, the two states had exchanged their supplemental reports, *viz.*, "Supplemental Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact," David L. Pope, October 4, 1985, and "Memorandum to the Arkansas River Administration," J. William McDonald, October 4, 1985.

The Colorado report concluded that the mass analyses indicated no significant historic depletions, with the possible exception of tributary inflow from the eastern plains of Colorado. Accordingly, Colorado took the position that only "plains precipitation during the period 1974-1982 is a matter that warrants further investigation." *Id.*, p. 22. Colorado also stated that it could not "agree to undertake an investigation into well development in Colorado when the single and double mass diagrams [did] not suggest that well development in Colorado [had] had an impact on usable stateline flows." *Id.*, p. 23. Kansas, on the other hand, based its view of the investigation on certain relevant engineering studies, the history of water use on the Arkansas River, and the single and double mass analyses, and concluded that there had been significant postcompact depletions, primarily from well development in the 1950s and

1960s, and that further bilateral investigation of the depletions should be undertaken in ten different areas.

On October 8, 1985, the Arkansas River Compact Administration adopted a resolution terminating the Article VIII(H) investigation except in the limited area of mutual agreement that the investigation should proceed. At that time, Colorado expressly refused to undertake an investigation into well development in Colorado until such time as an investigation of drought and soil convervation pointed to further investigation. In short, Colorado refused to investigate the substance of Kansas' claims concerning the material depletions in usable stateline flows caused by certain administrative practices and the proliferation of unregulated postcompact wells.

At the meeting of the Compact Administration on December 10, 1985, Colorado rejected Kansas' requests to investigate the impact on the Arkansas River of: 1) Colorado's substantial, postcompact ground water depletions of surface flows at the stateline; 2) the failure of Colorado to administer ground water priorities against surface priorities; 3) Colorado's artificially transferring water from the storage pool in Trinidad Reservoir to the sediment pool and then refilling the storage pool to the detriment of downstream users; 4) the consequences of expected future increases in the consumption of Colorado's transmountain return flows; and 5) Colorado's unilateral rejection of the Arkansas River Compact Administration's Resolution of July 24, 1951, requiring that any reregulation of the native waters of the Arkansas River be approved by the Compact Administration. Additionally, Colorado refused to enjoin its postcompact ground water appropriations which result in surface depletions, despite the fact that those appropriations materially deplete the usable and available flows of the Arkansas River. Consequently, Kansas has no alternative but to invoke the original jurisdiction of this Court to protect down-

stream water users in Kansas who are being harmed by Colorado's continuing violations of the Compact.

POINTS OF LAW

The Court has held that conflicts between states concerning entitlement to the waters of interstate streams may properly be adjudicated under the Court's original jurisdiction. Article III, Section 2, United States Constitution; 28 U.S.C. § 1251; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Wyoming v. Colorado*, 259 U.S. 419 (1922). In addition, the Court has exercised its original jurisdiction to determine the rights between two states to waters of an interstate stream that are equitably apportioned under a compact. *Texas v. New Mexico*, 421 U.S. 927 (1975). In this case, Colorado has violated the Arkansas River Compact by allowing substantial postcompact increases in water use. Colorado's actions have resulted in the material depletion of the Arkansas River and have impaired Kansas' entitlement as clearly defined by the Compact, a federal law, to the waters of the Arkansas River. Therefore, the case presents a justiciable controversy which ought to and can only be decided by this Court. *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Texas v. New Mexico*, 462 U.S. 554 (1983).

The administrative investigation pursuant to Article VIII(H) has effectively terminated because of Colorado's refusal to cooperate. Colorado has taken the position that the investigation should continue at a snail's pace, in areas unrelated to the basic problem identified by all of the experts, including Colorado's own officers and consultants. In response to Colorado's stonewalling, and in view of the ongoing substantial injury to water users in Kansas, Kansas retained the internationally recognized firm of S. S. Papadopulos & Associates, Inc. to

evaluate the impact of postcompact well development and water use in Colorado on the Arkansas River. In its Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact of December 6, 1985, Papadopulos & Associates express the opinion that postcompact well development in Colorado has unquestionably materially and substantially depleted the Arkansas River and that Colorado's purposeful attempt to avoid study of well depletions is not remotely justifiable on the basis of any hydrologic or engineering reason. The conclusion follows that Colorado seeks to delay or obstruct the Administration's investigation of postcompact wells to avoid the inevitable determination that the wells were and are resulting in compact violation.

Colorado has followed and continues to follow a course of conduct that renders the administrative investigation a meaningless effort designed to delay a resolution of the conflict. At the same time, Colorado continues its ongoing violation of the Compact to the substantial injury of Kansas. Accordingly, the Court should exercise its jurisdiction to decide this controversy, which will result in a prompt and efficient resolution of an existing and inevitable conflict.

It is respectfully requested that the motion for leave to file the Complaint be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 9(2) of the Rules of the Supreme Court of the United States, that on the 16th day of December, 1985, I served the requisite number of copies of the foregoing Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint, by first class mail, on the Governor and the Attorney General of the State of Colorado, and on opposing counsel.

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